Jurisdictional Statement

81-1614

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No. A-664

IN THE

Supreme Court of the United States

October Term, 1981

STANLEY ROSENBERG and BARBARA ROSENBERG, *et al.*,

Appellants,

v.

JOHNS-MANVILLE SALES CORPORATION, *et al.*,

Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

JURISDICTIONAL STATEMENT

NORMAN J. LANDAU
Counsel for Appellants
233 Broadway
New York, NY 10279
(212) 962-7545

Question Presented.

Whether the New York statute of limitations (CPLR §214), as construed by the courts of this state, is violative of the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution of the United States as well as the right to trial by jury guaranteed by the Seventh and Fourteenth Amendments of the Constitution of the United States when applied to dismiss personal injury actions as a matter of law where the injury which results is not manifested or cognizable until many years after use of or exposure to the product in question.

Parties to the Proceeding.

Stanley Rosenberg and Barbara Rosenberg, Plaintiffs-Appellants, against Johns-Manville Sales Corporation, Successor by Merger with Johns-Manville Products Corporation, Johns-Manville Sales Corporation and Johns-Manville Corporation, Unarco Industries, Raybestos-Manhattan, Inc., Owens-Corning Fiberglas Corp., Pittsburgh Corning Corporation, Eagle-Picher Industries, Inc., Westinghouse Electric Corp., The Southern Asbestos Co., H. K. Porter Company, Inc., and Uniroyal, Inc., Defendants-Respondents. Action No. 1.

Jerome Brenner and Anita Brenner, Plaintiffs-Appellants, against Johns-Manville Sales Corporation, Successor by Merger with Johns-Manville Products Corporation, Johns-Manville Sales Corporation and Johns-Manville Corporation, Unarco Industries, Raybestos-Manhattan, Inc., Owens-Corning Fiberglas Corp., Pittsburgh Corning Corporation, Eagle-Picher Industries, Inc., Westinghouse Electric Corp., The Southern Asbestos Co., H. K. Porter Company, Inc., and Uniroyal, Inc., Defendants-Respondents. Action No. 2.

Dorothy Cohen, Administratrix of the Estate of Emanuel Cohen, Plaintiff-Appellant, against Johns-Manville Products Corporation, Johns-Manville Sales Corporation, Johns-Manville Corporation, Unarco Industries, Raybestos-Manhattan, Inc., Owens-Corning Fiberglas Corp., Pittsburgh Corning Corporation, Eagle-Picher Industries, Inc., Asbestos Corp. of America, Eastern Refraction Company, Inc., Westinghouse Electric Corp., The Southern Asbestos Co., H. K. Porter Company, Inc., Alpha Assoc., Inc., Shook and Fletcher Insulation Company, Sepco Corporation, Uniroyal, Inc., and Cummings Insulation Co., Defendants-Respondents. Action No. 3.

Rose Failla, Administratrix of the Estate of Vincent Failla, Plaintiff-Appellant, against Johns-Manville Products Corporation, Johns-Manville Sales Corporation, Johns-Manville Corporation, Unarco Industries, Raybestos-Manhattan, Inc., Owens-Corning Fiberglas Corp., Pittsburgh Corning Corporation, Eagle-Picher Industries, Inc., Asbestos Corp. of America, Eastern Refraction Company, Inc., Westinghouse Electric Corp., The Southern Asbestos Co., H. K. Porter Company, Inc., Alpha Assoc., Inc., Shook and Fletcher Insulation Company, Sepco Corporation, Uniroyal, Inc., and Cummings Insulation Co., Defendants-Respondents. Action No. 4.

Joseph Ferrarese and Lena Ferrarese, Plaintiffs-Appellants, against Johns-Manville Sales Corporation, Successor by Merger with Johns-Manville Products Corporation, Johns-Manville Sales Corporation and Johns-Manville Corporation, Unarco Industries, Raybestos-Manhattan, Inc., Owens-Corning Fiberglas Corp., Pittsburgh Corning Corporation, Eagle-Picher Industries, Inc., The Southern Asbestos Co., H. K. Porter Company, Inc., Uniroyal, Inc., The Celotex Corporation, and Colt Industries, Inc., Defendants-Respondents. Action No. 5.

Rose Weinberg, Administratrix of the Estate of Albert Weinberg, Plaintiff-Appellant, against Johns-Manville Products Corporation, Johns-Manville Sales Corporation, Johns-Manville Corporation, Unarco Industries, Raybestos-Manhattan, Inc., Owens-Corning Fiberglas Corp., Pittsburgh Corning Corporation, Eagle-Picher Industries, Inc., Asbestos Corp. of America, Eastern Refraction Company, Inc., Westinghouse Electric Corp., The Southern Asbestos Co., H. K. Porter Company, Inc., Alpha Assoc., Inc., Shook and Fletcher Insulation Company, Sepco Corporation, Uniroyal, Inc., and Cummings Insulation Co., Defendants-Respondents. Action No. 6.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981.

No. A-664.

STANLEY ROSENBERG and BARBARA ROSENBERG, *et al.*,

Appellants,

v.

JOHNS-MANVILLE SALES CORPORATION, *et al.*,

Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS.

Jurisdictional Statement.

The appellants herein appeal from the final judgment of the Court of Appeals of New York State, dated December 22, 1981, holding that the New York statute of limitations (CPLR §214) as applied in this case is unconstitutional as being violative of appellants' rights to due process and trial by jury as guaranteed by the Fifth, Seventh and Fourteenth Amendments of the Constitution of the United States.

Opinions Below.

The opinions of the lower courts in this matter to wit: the Supreme Court of New York, the Appellate Division, First Department, of the Supreme Court of New York and the Court of Appeals of New York State are all annexed in the Appendix hereto.

Jurisdiction.

The judgment of the New York Court of Appeals affirming the dismissals of the complaints herein was dated and entered on October 29, 1981. A motion to amend the remittitur to obtain a direct ruling on the constitutional issues raised was granted, said order dated December 22, 1981.

A notice of appeal and application for an extension of time to docket the appeal was dated and served on January 18, 1982. Said application was granted by the Hon. Thurgood Marshall allowing an extension up to and including February 26, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (2).

Constitutional and Statutory Provisions.

Fifth Amendment, United States Constitution:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

Seventh Amendment, United States Constitution:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

Fourteenth Amendment, United States Constitution:

> No State shall . . . deprive any person of life, liberty, or property without due process of law.

CPLR §214: New York Statute of Limitations:

> The following actions must be commenced within three years:
>
> * * *
>
> 5. An action to recover damages for a personal injury.

Raising the Federal Question.

Throughout the course of this litigation the appellants have consistently raised the claim that any statute of limitations which deprives a person of a reasonable (and in fact any) opportunity to seek legal redress for legitimate grievances is an unconstitutional denial of due process of law. This constitutional issue was addressed by the New York Court of Appeals when it held,

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the holding that the plaintiffs' causes of action accrued and the statutes of limitations commenced when the employment-related exposure to asbestos particles occurred deprived plaintiffs of due process of law.

In addition it has been the appellants' position that a viable cause of action does not arise until all of the necessary elements are satisfied. These include the allegedly tortious conduct supporting the claim of liability

as well as the *injuries* leading to a claim for damages. The issue as to when the injuries occurred is, at the very least, one of fact, not of law. Hence the actions of the state courts in holding as a matter of law that the injuries developed immediately upon exposure to the harmful product was a clear usurpation of a jury function and violated the appellants' constitutional rights to a jury trial. This point was raised before the Court of Appeals and specifically addressed by Judge Jacob Fuchsberg in his dissent.

The New York Court of Appeals thus considered and expressly rejected these federal constitutional claims.

Statement of the Case.

This appeal, as it has been throughout the appellate process, is a consolidation of six (6) actions which were dismissed by the courts of New York State. All of these cases, for the purposes of the appeals, involve virtually interchangeable fact patterns as well as the identical issue, to wit: the constitutionality of the statute of limitations in question. For purposes of illustration only the case of Stanley and Barbara Rosenberg will be discussed herein.

The appellant's decedent, Stanley Rosenberg, worked for the Department of the Navy at Brooklyn Navy Yard from 1951 to 1965. In the course of his employment Mr. Rosenberg worked extensively with asbestos products manufactured, sold and supplied by the defendant corporations. His health and physical condition during this entire period and up until 1976 were excellent. In 1976 Stanley Rosenberg was diagnosed as suffering from the disease of malignant mesothelioma, an incurable and fatal form of cancer affecting the pleural lining of the lungs. This disease was solely and proximately caused by Stanley Rosenberg's exposure to the defendant's asbestos products. The disease of mesothelioma has a latency period between initial exposure and any cognizable effect. This

from approximately twenty (20) to forty (40) years. Of course not everyone exposed to asbestos subsequently develops an asbestos related disease but, as in the case of mesothelioma victims, even those unfortunate persons that do, exhibit no symptoms until the delayed development and spread of the carcinoma many years later. Stanley Rosenberg died from this disease on June 3, 1980.

At the heart of the lawsuits filed by the appellants as well as many other asbestos workers or their survivors is the issue of the industry's awareness of the potential health risks of their products and their grossly inadequate response to this known health hazard. The evidence which would be presented in this case would reveal a consistent and conscious policy on the part of the asbestos industry to withhold information from the public including those working directly with asbestos, of the life threatening dangers of their products.

Plaintiffs commenced this action by service of a summons and complaint on the defendants in April and May of 1978, well within three (3) years from the date the injury manifest itself and was capable of diagnosis. Plaintiffs alleged that defendants were jointly and severally liable in negligence, breach of warranty and strict products liability for failing to warn plaintiffs of known asbestos health hazards. Defendants moved for summary judgment to dismiss the complaint on the grounds that these actions were barred by New York's statute of limitations since the dates of verifiable *exposure* to the product in question was more than three (3) years prior to the date the actions were instituted. Justice Thomas Hughes of the New York Supreme Court granted the defendant's motion despite his reservations to the contrary. In his memorandum decision he stated:

"While this Court is in agreement with (New York Court of Appeals') Judge Fuchsberg's well reasoned dissent to the *Thornton* decision wherein he stated that

'Good sense and good law therefore require, it seems to me (and apparently to many Courts) [*] that the injured user not be foreclosed from having his day in Court before he even has knowledge of any injury and certainly not before any injury has occurred.' (*Thornton v. Roosevelt Hospital*, 47 N. Y. 2d 780 at p. 783, 1979); this Court is constrained to follow the majority decision therein and *stare decisis.*"

The decision of the lower court therefore was that the date of accrual for statute of limitations purposes would be measured from the time of exposure despite the fact that the injury alleged had not yet developed and that no cognizable injury or symptoms had manifest themselves within that statutory period (Justice Hughes' full opinion is annexed in the appendix hereto).

This decision was affirmed on appeal to the Appellate Division—First Department of the New York Supreme Court. The constitutional issues of due process and right of trial by jury were raised on this appeal and rejected by the court which also obviously felt constrained by the prior decisions of the New York Court of Appeals (the brief order of affirmance is annexed in the appendix hereto).

Leave to appeal to the Court of Appeals of New York State was sought and granted by the Appellate Division (a copy of the order granting same is annexed in the appendix hereto).

Upon submission of briefs as well as upon oral argument before the Court of Appeals the constitutional implications of an affirmance were pressed vigorously by the appellants. It was and is the contention of the appellants that any statute which deprives a person of a reasonable opportunity to seek redress in the courts for tortious conduct inflicting damage or injury upon him was a violation of his or her due process rights pursuant to Amendments

V and XIV of the United States Constitution. In addition, it was argued that the decision of the lower courts in holding that as a matter of law a claim for asbestos disease accrues upon inhalation of asbestos fibers violates plaintiff's right to a trial by jury of the factual issues present therein pursuant to Amendment VII of the United States Constitution.

The New York Court of Appeals affirmed the decision of the lower courts with a dissent from Judge Jacob Fuchsberg. (A copy of the Court of Appeals decision is annexed in the appendix hereto.)

THE QUESTION IS SUBSTANTIAL.

The right to have legitimate claims resolved on their merits in the judicial arena is one of the most fundamental and precious rights guaranteed to Americans. Any state law which abridges that right by denying citizens a reasonable opportunity to have access to our courts violates the Due Process Clause of the United States Constitution. The fact that the statute in question herein as it has been construed by the highest court of New York State, deprives aggrieved citizens of *any* opportunity to seek legal redress for the catastrophic injuries inflicted upon them raises an issue of substantial importance.

Appellants do not question the authority of the state legislature or judiciary to establish time limitations within which to commence a lawsuit. However, it is well recognized that where the time provided is so short or where, as here, it is nonexistent, so as to deprive an injured party of a reasonable opportunity to pursue their legal rights then such results require the intervention of this Court. This Court has in fact long held that such judicial intervention is appropriate whether the defect lies within the statutory time provided, the manner of application or the definition of when such periods being to accrue.

> [S]tatutes of Limitations must give a party a reasonable time to sue, and if a particular statute should fail to do so it would be within the competency of the courts to declare the same unconstitutional and void.

Campbell v. Haverhill, 155 U. S. 610, 615 (1895).

One hundred and fifty years ago in the case of *Jackson v. Lamphire*, 28 U. S. 280 (1830), the Supreme Court of the United States examined the appropriate relationship between the legislature and the judiciary specifically with respect to statutes of limitation. The Court stated:

> The time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run will generally depend on the sound discretion of the legislature . . . Cases may occur where the provisions of a law on those subjects may be so unreasonable as to amount to a denial of a right, and call for interposition of the court . . . 28 U. S. at 289.

(See also *Atchafalaya Land Co. v. F. B. Williams Cypres Co.*, 258 U.S. 190, 42 S. Ct. 284 [1922]).

A basic premise underlying a statute of limitations is that a reasonably diligent person could know that a cause of action has accrued and should forfeit that action for failing to bring suit within a reasonable amount of time. The Supreme Court in *Wilson v. Iseminger*, 185 U. S. 55, 22 S. Ct. 573 (1901), explained:

> It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be

> a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. 185 U. S. at 62, 22 S. Ct. at 575.

And again:

> A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free access to them for a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings for their protection.
>
> *Canadian No. Ry. Co. v. Egger*, 252 U. S. 553, 562, 40 S. Ct. 402 (1920).

The statute in question as it relates to asbestos disease claims requires a person to commence legal action before a semblance or trace of any injury has developed. Asbestos disease is much more than simple inhalation of asbestos fibers. Time is also a critical factor. In addition, one cannot possibly know whether any form of asbestos disease will ever result from exposure. Inhalation does not automatically produce disease and only many years after exposure is it possible to know if asbestos disease is present.

This Court has already confronted the issues raised in this case and has come down clearly and firmly against the application of a "date of exposure" rule in cases involving latent or delayed diseases.

In *Urie v. Thompson*, 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1202 (1949), the plaintiff suffered from silicosis caused by his continuous inhalation of silica dust as he worked in the cabs of locomotives. Plaintiff sued the railroad under the Federal Employers' Liability Act (hereinafter F.E.L.A.), 45 U.S.C. 151 *et seq*. Section 56 of

the F.E.L.A. provided a three-year statute of limitations. The key element to that statute as well as to the entire discussion herein is obviously not the *amount* of time that attaches to any proscriptive period of limitations, but rather to the *point* in time that such a period should start to accrue.

This Court rejected any "mechanical analysis" of the accrual of the injury because it would be inconsistent with the traditional purposes of statutes of limitations. Such statutes "conventionally require the assertion of claims within a specified period of time *after notice* of the invasion of legal rights." 337 U. S. at 170, 60 S. Ct. at 1025. (Emphasis supplied.)

The Court rejected an exposure rule because:

> It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this view Urie's failure to diagnose with a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability. 337 U. S. at 169.

This Court thus refused to time-bar *Urie* on the basis of his "blameless ignorance." Rather, it held that

> [N]o specific date of contact with the substance can be charged with being the date of injury, inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time; consequently, the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves * * *. 337 U. S. at 170 (citation omitted).

Thus in a latent injury type case remarkably similar on the facts to the one at bar, this Court has held that the injury occurs, not at the time of exposure, but when the disease is manifested or diagnosed.

The statute as construed effectively requires the commencement of legal proceedings before any complete cause of action (exhibiting the required elements of liability and damages) even exists. Commenting on this situation in another case involving the interpretation of a statute of limitations former Judge Jerome Frank of the Second Circuit Court of Appeals stated:

> "Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a nonexistent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of logical action, that a statute of limitations does not begin to run against a cause of action before that cause of action exists, i.e., before a judicial remedy is available to a plaintiff."

Dincher v. Marlin Firearms Co., 198 F. 2d 821, 823, (2d Cir. 1952).

Along with the extremely dubious due process implications which this rule of law exhibits so too does it deprive an injured party of his constitutional right to a jury trial on questions of fact. The courts of New York have held that as a matter of law the date that an asbestos induced injury will be considered to have occurred is immediately upon exposure to the substance in question. This is not only unsound, unscientific and against the weight of medical evidence in the field, but also usurps the jury

function to decide issues of fact. It is submitted that, at the very least, the issue of when the injury herein arose and hence the date when a viable cause of action first existed, is one of fact and therefore within the constitutionally mandated province of a jury for resolution where one is requested. This issue was raised in the brief to the Court of Appeals and was addressed by Judge Fuchsberg in his dissent. "...[S]ince the issue of fact...left is a case of dates of inhalation versus dates when the damaging disease came into existence, the question was one for triers of fact."

New York has construed its statute of limitations (CPLR 214) in such a way as to deprive a particular class of people (those injured by asbestos) of their constitutional rights of due process and trial by jury. The denial of these fundamental rights guaranteed by the United States Constitution is blatant and substantial.

CONCLUSION

For these reasons, this court should note probable jurisdiction of this appeal.

Respectfully submitted,

NORMAN J. LANDAU
Counsel for Appellants

Appendix

Appendix A—Decision of Supreme Court, New York County.

SUPREME COURT,

NEW YORK COUNTY,

Special Term, Part I.

[SAME TITLES, ALL SIX ACTIONS.]

HUGHES, J.:

Motions numbered 106, 139, 62 and 43 are consolidated for purposes of disposition.

This action is one of seven separate actions involving common questions of law and fact.

Plaintiffs or their decedents in each of the seven actions allegedly were exposed as employees in the construction trades to asbestos.

They allegedly suffer from or succumbed to asbestos related illnesses such as malignant mesothelioma or asbestosis. Various actions for wrongful death, pain and suffering, and derivative actions for loss of services have been brought by plaintiffs against defendants' corporations that manufactured or supplied asbestos for various contractors and builders.

All of the plaintiffs or their decedents were last employed in asbestos related trades more than four years prior to commencement of their actions.

With the exception of one plaintiff, their last contact with asbestos in employment preceded their suits by more than ten years.

Plaintiffs further allege that they were not aware that they were suffering from an asbestos related condition more than three years prior to suit.

Defendants move pursuant to CPLR 3211(a)5 and 3212 alleging that the causes of action herein are barred by the appropriate statutes of limitations.

Each of the complaints asserts a cause of action in negligence, breach of warranty, and strict products liability.

A cause of action in negligence or strict products liability is governed by a three-year statute of limitations pursuant to CPLR 214.

A cause of action in breach of warranty is governed by a four-year statute of limitations provided for by U.C.C. §2-725.

Each of the motions and cross-motions herein hinges on a determination of when plaintiffs' causes of action accrued or when the statutes of limitations began to run.

In breach of warranty a cause of action accrues from the date the defective property is sold. (*Victorson v. Bock Laundry,* 37 N. Y. 2d 395). The last possible sale of asbestos to which any of the plaintiffs could have been exposed transpired prior to their termination from asbestos related employment. Each of the seven plaintiffs, as previously stated, had left such employment more than four years prior to commencement of the actions.

Similarly, the statute of limitations in a cause of action in strict products liability or negligence would accrue at the time of ingestion of the harmful substance. (See *Thorton v. Roosevelt Hospital,* 47 N. Y. 2d 780; *Victorson v. Bock Laundry Machine Co.,* 37 N. Y. 2d 395; *Schwartz v. Heyden Chem. Corp.,* 12 N. Y. 2d 212, cert. denied 374 U. S. 808; *Schmidt v. Merchants Despatch Transp. Co.,* 270 N. Y. 287). Thus plaintiffs' actions are barred by the respective statutes of limitations. Plaintiffs' wrongful death actions fall as they did not have an otherwise valid cause of action at the date of death (EPTL 5-4.1).

While this Court is in agreement with Judge Fuchsberg's well reasoned dissent to the *Thorton* decision wherein he stated that "Good sense and good law therefore require, it

seems to me (and apparently to many Courts) [*] that the injured user not be foreclosed from having his day in Court before he even has knowledge of any injury and certainly not before any injury has occurred". (*Thorton v. Roosevelt Hospital,* 47 N. Y. 2d 780 at p. 783); this Court is constrained to follow the majority decision therein and *stare decisis.*

> "We decline the invitation to judicially extend the discovery rule to strict products liability actions. Such matter is best reserved for the Legislature, and not the Courts". (*Thorton v. Roosevelt Hospital,* 47 N. Y. 2d 780 at p. 781).

Plaintiffs argue that defendants should be estopped from pleading the statute of limitations due to fraud and deception by the defendants.

> "It is the rule that a defendant may be estopped to plead the statute of limitations where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action" (*Simcuski v. Saeli,* 44 N. Y. 2d 442, at p. 449).

Although plaintiffs rely heavily on the *Simcuski* case, the reasoning therein is not applicable to the cases at hand. In *Simcuski* the plaintiff was allegedly told by her surgeon that the operation she had undergone was a success. In fact the surgeon allegedly knew of an error he had committed in a surgical procedure and in an effort to cover up the error told plaintiff that the condition would be cured by physiotherapy. Plaintiffs herein cannot point to a close direct relationship to defendants as was described in *Simcuski.* No direct fabrication and clear deceptions have been pointed to in the cases at hand.

Plaintiffs, after discovery, are unable to point to specific instances of deception although they do cite instances where defendants apparently were aware of harmful effects of asbestos and failed to disclose that information. In fact, plaintiffs recite measures, allegedly inadequate, by defendants to warn the public and protect asbestos workers within the last fifteen to twenty years.

> "If the conduct relied on (fraud, misrepresentation or other deception) has ceased to be operational within the otherwise applicable period of limitations (or perhaps within a reasonable time prior to the expiration of such period), many Courts have denied application of the doctrine on the ground that the period during which the plaintiff was justifiably lulled into inactivity had expired prior to the termination of the statutory period, and that the plaintiff had thereafter had sufficient time to commence his action prior to the expiration of the period of limitations". (*Simcuski v. Saeli,* 44 N. Y. 2d 442, at p. 449).

Plaintiffs have not set forth a sufficient recent basis in fraud or deception to estop defendants from pleading the statute of limitations.

Motions and cross motions by defendants for summary judgment dismissing the complaint of the plaintiff on the grounds that the action is barred by the statute of limitations is granted.

Settle order.

Dated: Sept. 4, 1979.

T. J. H.
J. S. C.

Appendix B—Order of Affirmance by the Appellate Division, First Judicial Department of the New York Supreme Court.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on October 2, 1980.

Present:

Hon. Leonard H. Sandler,
Justice Presiding,
David Ross,
Arthur Markewich,
Max Bloom,
Justices.

[SAME TITLES, ALL SIX ACTIONS.]

Appeals having been taken to this Court by the above-named plaintiffs-appellants in each action from the orders of the Supreme Court, New York County (Hughes, J.), entered on September 20, 1979, September 20, 1979, September 25, 1979, October 15, 1979, September 20, 1979 and October 19, 1979, respectively, which granted the defendants-respondents' motions and cross-motions for summary judgment dismissing the complaints,

And said appeals having been argued by Mr. Bernard Meyerson of counsel for the plaintiffs-appellants, by Mr. Lawrence T. D'Aloise, Jr. of counsel for the respondents The John-Mansville Corporations, Pittsburgh Corning Corporation, Eagle-Picher Industries, Inc., Colt Industries, The Celotex Corporation, by Mr. Franklin N. Meyer of counsel for the respondents Raybestos-Manhattan, Inc., Owens-Corning Fiberglas Corp. and Unarco Industries, Inc., by Mr. Michael Majewski of counsel for the

respondents Southern Asbestos Co. and H. K. Porter Company, Inc. (Actions 1, 2 and 5) and by Mr. Carl H. Sword of counsel for the respondents Southern Asbestos Co. and H. K. Porter Company, Inc. (Actions 3, 4 and 6); and due deliberation having been had thereon,

It is unanimously ordered that the orders so appealed from be and the same are hereby affirmed, without costs and without disbursements.

Enter:

JOSEPH J. LUCCHI
Clerk.

Appendix C—Memorandum Decision of the Court of Appeals.

COURT OF APPEALS,

STATE OF NEW YORK.

4 No. 434

IN THE MATTER

OF

JEANNE STEINHARDT, as Executrix for James McKee, Jr.,

Appellant,

v.

JOHNS-MANVILLE CORPORATION, *et al.*,

Respondents.

1 No. 435

STANLEY ROSENBERG & ano.,

Appellants,

v.

JOHNS-MANVILLE SALES CORPORATION, &c., *et al.*,

Respondents.

and 5 other actions:
Brenner v. Johns-Manville *et al.*
Cohen v. Johns-Manville *et al.*
Failla v. Johns-Manville *et al.*
Ferrarese v. Johns-Manville *et al.*
Weinberg v. Johns-Manville *et al.*

(434) Frank S. Kedzielawa, Carl A. Green & James W. Kirkpatrick, Buffalo, for appellant.

Alexander C. Cordes & Paul F. Jones, Buffalo, for respondents GAF *et al.*

Lawrence T. D'Aloise, Jr., White Plains, & Daniel T. Roach, Buffalo, for respondent Johns-Manville.

Thomas F. Segalla, Buffalo, for respondent Fibreboard Paper.

(435) Norman J. Landau, NY City, for appellants.

Lawrence T. D'Aloise, Jr., White Plains, for respondents Johns-Manville *et al.*

Franklin N. Meyer, NYC, for respondents Raybestos *et al.*

Michael Majewski & Joseph D. Ahearn, NYC, for respondents Southern Asbestos & H. K. Porter Co.

James J. Lysaght, Mineola, for respondent Colt Industries.

MEMORANDUM:

The orders of the Appellate Division should be affirmed, with costs.

Plaintiffs in these actions, asserting injuries caused by the inhalation of asbestos particles, each commenced his action more than four years after their or their decedents' last employment-related exposure to asbestos. In *Schmidt v. Merchants Despatch Trans Co* (270 N Y 287), where the plaintiff alleged that the inhalation of dust while in the defendant's employ caused him to contract the disease known as pneumoconiosis, this Court held that the statutory period of limitations began to run when the plaintiff inhaled the foreign substance. This principle was later reaffirmed in *Schwartz v. Heyden Newport Chemical Corp* (12 NY2d 212; cert den 374 US 808), involving a compound inserted into the plaintiffs' sinuses for the purpose of making them more perceptible in X-ray examination. Accordingly, if this rule is still controlling, each of

the causes of action brought by plaintiffs is barred by the statute of limitations. Plaintiffs now urge, however, that the statutes of limitations applicable to their cases should not run from the date of the last exposure to the invading substance, but rather from the date on which the asbestos related disease was or could have been discovered. We are unable to adopt this proposed standard, and we reaffirm the principle announced in *Schmidt* and followed in *Schwartz*. Only recently, in *Thornton v. Roosevelt Hospital* (47 NY2d 780), where it was alleged that a thorium dioxide substance manufactured by the defendant and injected into the deceased plaintiff resulted in the onset of cancer, we held "that the cause of action accrued at the time of invasion of decedent's body, and not at the time" the condition became apparent. There, we noted that further extension of the limited discovery provision contained within the CPLR (214-a) was a matter best reserved for the Legislature, and not for the courts.* We believe it to be inappropriate and injudicious to intrude into an area best suited for legislative scrutiny. We have considered plaintiffs' other contentions and find them to be without merit.

FUCHSBERG, J. (dissenting):

The orders appealed from in these cases should be reversed and the motions for summary judgment denied.

Once again we are confronted with a determination that plaintiffs who, alleging tortious wrongdoing as a result of which they were injured, are held to have been barred by the statute of limitations before they learned or could have learned that they had sustained the injuries of which they complain.

Though to state this proposition would appear to be to refute it, the majority, under what it takes to be the restraint of three cases, *Schmidt v. Merchants Despatch*

*As the dissent recognizes, the Legislature has acted but has so far gone no further than "Agent Orange" cases.

Transp. Co. (270 NY 287), *Schwartz v. Heyden Newport Chemical Corp.* (12 NY2d 212) and, most recently, *Thornton v. Roosevelt Hospital* (47 NY2d 770), a decision in which I filed a dissent, in effect upholds it.

In my view, the cases cited are too confusing and contradictory to support such a result. For example, in *Schmidt,* though the court held that dust which produced a disease of the lungs set off the running of the statute when it was ingested rather than when the injury came to the fore, the court, inexplicably, also proclaimed (p. 300) that "there can be no doubt that a cause of action accrues only when the forces wrongfully put in motion *produce injury*" (emphasis added). Further, in the relatively short time which has elapsed since *Thornton* was decided, the Legislature already has issued policy pronouncement that cut across the legal philosophy they bespoke.[1] In such circumstances, the vitality of judge-made law depends in no small measure upon a readiness to have the judiciary, and not the Legislature, as *Thornton* and the majority memorandum in this case suggest, make its own corrections.

The underlying principle is hornbook law. As Dean Prosser put it, "the statute of limitations does not begin to

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[1]In amending section 214 of the Civil Practice Law and Rules, which details the various statutes of limitations, the Legislature, at its last regular session, included the following statements in its formal legislative findings:

"* * * It was never the intent of the legislature, in imposing limitations, to foreclose the citizens of this state from prosecuting legitimate claims, provided such claims are diligently and expeditiously pursued. An exception to the general period of limitation rule is required when the pathological effect of an injury occurs without perceptible trauma, and the victim is blamelessly ignorant of the cause of the injury" (L. 1981, ch 266).

True, in the compromising fashion of legislative bodies (see *O'Malley v. Macejka,* 48 NY2d 530, 533-534), these declarations were made applicable to "agent orange" cases alone. But, as with other social catalysts, what it accelerated was a return in this area to the mainstream of legal thought.

run against a negligence action until some damage has occurred" (Prosser, Law of Torts [4th ed], p 144). Or, as was acknowledged with apparent reluctance in Schwartz, "since, then, the recognized damages in negligence cases are pain and suffering, lost earnings and, we suppose, damage to the structure of the body, it is questionable whether any cause of action exists before these things actually happen" (*Schwartz, supra,* at p 217).

In this court, contrary rulings have troubled its Judges, and, ultimately, have been repudiated by the court as a whole. So, in *Schwartz* itself, a strong dissent by Chief Judge Desmond and Judge (later Chief) Judge Fuld left no room for misunderstanding when it warned that "it would be unreasonable and perhaps unconstitutional to hold that time to sue expired before it was possible for plaintiff to learn of the wrong" (*Schwartz, supra,* at p 219). And, the clarion clear comment that "it is unthinkable that a person should be time-barred from prosecuting a cause of action before he ever had one", first made by Judge (later Chief Judge) Breitel in dissent in *Mendel v. Pittsburgh Plate Glass Co.* (25 NY2d 340, 346), was later to be adopted by the whole court in *Victorson v. Bock Laundry* (37 NY2d 395, 401).

Guided by these beacons, I now turn to the opposing positions on which summary judgment turned. The defendants' needs no elaboration; it is simply that the actions arose when each of the plaintiffs breathed the asbestos-laden air, that is, at the time of exposure. If this contention is credited, of course, the wrongful conduct and ensuing damages for all practical purposes would have been simultaneous. But the plaintiffs do not agree; they insist that the scientific facts are at odds with this unified concept. Pointing to medical authority, they contend that, while the unwanted invasions of their lungs by environmental air which had been contaminated by asbestos dust are the wrongful acts to which they were subjected, the damages they sustained were in the form of diseases which did not come about until much later. From this exposition,

the diseases, asbestosis and mesothelioma, the latter a cancer of the mesothelial cells which surround the organs of the chest cavity, are said to be consequential, as distinguished from immediate, in their temporal character (see also *Urie v. Thompson,* 337 US 163, 170 ["consequences of the exposure are the product of a period of time rather than a point of time"]).

The plaintiffs go on to assert that the properties of particles of asbestos are such that their inhalation will not necessarily result in the contraction of the disease; that, unlike chemical compounds, the particles do not break down into reactive elements when lodged in the body; that those who are exposed may never sustain any injury at all; that, even if a cancerous tumor later forms, it will not have begun to do so at the time of exposure; that, before such an event will occur, the asbestos may lay dormant for years; and that the future time when it may develop is unpredictable.

In this apposition, the statute of limitations question is not one presenting a choice, as the majority would have it, between the times of inhalations and the times of discovery of the subsequent disease. Were that so, absent a discovery rule, the defendants' motions would indeed have had to have been granted. But, since the issue of fact fleshed out by the motions instead left it a case of dates of inhalation versus dates when the damaging disease came into existence, the question was one for triers of fact.

It follows that the orders of the Appellate Division must be reversed and the cases remitted for trial on the merits.

* * *

Order affirmed, with costs, in a memorandum. All concur, Meyer, J., on constraint of *Thornton v. Roosevelt Hosp.* (47 NY2d 780); except Fuchsberg, J., who dissents and votes to reverse in an opinion.

Decided October 29, 1981

Appendix D—Order of the Court of Appeals Amending Remittitur.

COURT OF APPEALS,

STATE OF NEW YORK.

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-second day of December A. D. 1981.

Present:

Hon. Lawrence H. Cooke, Chief Judge Presiding.

1 Mo. No. 1221 (B)

STANLEY ROSENBERG & ano.,

Appellants,

vs.

JOHNS-MANVILLE SALES CORPORATION, &c., *et al.*,

Respondents.

(and 5 other actions:
Brenner v. Johns-Manville *et al.*
Cohen v. Johns-Manville *et al.*
Failla v. Johns-Manville *et al.*
Ferrarese v. Johns-Manville *et al.*
Weinberg v. Johns-Manville *et al.*)

On the Court's own motion, it is

ORDERED, that the return of the remittitur in the above cause be and the same hereby is requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the holding that the plaintiffs' causes of action accrued and the statutes of limitations commenced when the employment-related exposure to asbestos particles occurred deprived plaintiffs of due process of law.

AND the Supreme Court, County of New York, hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

JOSEPH W. BELLACOSA
Clerk of the Court

Motion to Dismiss or Affirm

1

81-1614

No. A-664

Office - Supreme Court, U.S.
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MAY 4 1982
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In The

Supreme Court of the United States

October Term, 1981

STANLEY ROSENBERG and BARBARA ROSENBERG, et al.,

Appellants,

vs.

JOHNS-MANVILLE SALES CORPORATION, et al.,

Appellees.

On Appeal from the New York Court of Appeals

MOTION TO DISMISS

FRANK E. MAHER, P.C.
Attorney for Appellee
Celotex Corp.
Bowery Savings Bank Building
356 Fulton Street
Brooklyn, New York 11201
(212) 855-3400

6654

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QUESTIONS PRESENTED

1. Are appellants entitled to appeal as of right to the Supreme Court of the United States under 28 U.S.C. §1257(2)?

2. Should appellants be able to appeal to the Supreme Court, when the only question involved is one of state policy?

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Zucht v. King, 260 U.S. 174, 43 S. Ct. 24, 67 L. Ed. 194 (1922) 3

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Fifth Amendment 1

Fourteenth Amendment 1

Rule Cited:

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No. A-664

In The

Supreme Court of the United States

October Term, 1981

STANLEY ROSENBERG and BA[illegible]A ROSENBERG, et al.,

Appellants,

vs.

JOHNS-MANVILLE SALES CORPORATION, et al.,

Appellees.

On Appeal from the New York Court of Appeals

MOTION TO DISMISS

JURISDICTION

This appeal is based on 28 U.S.C. §1257(2). Appellants claim that the decision of the New York Court of Appeals, which upheld the validity of the New York statute of limitations, violates their due process rights under the Fifth and Fourteenth Amendments of the United States Constitution. To establish jurisdiction, appellants must show that the New York statute of limitations is unconstitutional. This appeal is not properly brought under

28 U.S.C. §1257(2), for the state statute was never challenged as unconstitutional in the New York Court of Appeals. Furthermore, no substantial federal question is raised, for these matters relate solely to state law and policy.

STATEMENT OF THE CASE

Appellants brought suit seeking recovery for injuries allegedly caused by the inhalation of asbestos particles. The New York Court of Appeals dismissed their complaints as barred by the New York three-year statute of limitations. Appellants contend that the three-year period should run from the date when the alleged asbestos disease was discovered, and not, as the New York Court of Appeals held, from the time the plaintiffs actually inhaled the asbestos. The last claimed exposure to asbestos of any of the plaintiffs, or their decedents was, at the latest, sixteen years ago.

POINT I

Since a non-statutory rule is challenged, appellants are not entitled to appeal to the Supreme Court as of right.

In 28 U.S.C. §1257(2), it expressly provides the right to appeal to the Supreme Court only:

> "Where is drawn in question the validity of a Statute of any state on the ground of it being repugnant to the Constitution. . . ."

In the present case, appellants never challenged a New York state statute. Appellants have challenged the judge-made accrual rule as depriving those injured by asbestos under constitutional rights. This judicially-created rule, provides that a statute of limitations runs from the date of injury, and at no later date. This rule was decided by the court in *Schmidt v. Merchants*

Dispatch Transportation Co., 270 N.Y. 287, 200 N.E. 824 (1936); not in the Legislature. Appellants made it clear in the New York Court of Appeals, that they were challenging only the judge-made accrual rule. The Supreme Court has consistently held that an appeal as of right will not lie unless the state statute is challenged before the highest court of the state.

Furthermore, any claim that a statute is being applied in a constitutionally, discriminatory fashion allows review by certiorari only. [*Zucht v. King*, 260 U.S. 174, 43 S. Ct. 24, 67 L. Ed. 194 (1922); *see also, Charleston Federal Savings & Loan Association v. Alderson*, 324 U.S. 182, 65 S. Ct. 624, 89 L. Ed. 857 (1944)].

In the present case, appellants in no way challenged a statute on federal grounds in the state court. By alleging that the New York statute of limitations is being applied so as to deprive those persons injured by asbestos under constitutional rights, appellants may seek review by writ of certiorari only. 28 U.S.C. §1157(2) does not apply. Accordingly, this appeal should be dismissed.

Point II

Since no substantial federal question is involved, jurisdiction should be denied.

This appeal raises no substantial federal question, for it relates solely to a state's power to prescribe the time in which suits may be brought. The Supreme Court has consistently held the state's statute of limitations does not present a federal question. [*Gaar Scott & Co. v. Shannon,* 233 U.S. 468; *Preston v. Chicago,* 226 U.S. 447, 450; *Wood v. Chesebrough,* 228 U.S. 672, 677, 33 S. Ct. 706 (1912).] The power of the states to regulate the procedure should be maintained. The New York statute of limitations, CPLR 214, does not impair fundamental rights but is rather a practical state policy consideration. This view is well-expressed in *Chase Securities Corp. v. Donaldson,* 325 U.S. 304, 65 S. Ct. 1137 (1945), in discussing statutes of limitations:

> "They are practical and pragmatic devices to spare the Courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. *Order of Railroad Telegraphers v. Railway Express Agency,* 321 U.S. 342, 349. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. . . . *They represent a public policy about the privilege to litigate.* Their shelter has never been regarded as what now is called 'fundamental' right or what used to be called the 'natural' right of the individual." 325 U.S. at 314. (Emphasis supplied.)

As a matter of state public policy, New York holds that claims for injury arising out of the inhalation or ingestion of a substance

accrues for statute of limitations' purposes at the time such substance is inhaled or ingested, and at no later date. This is the New York accrual rule, which appellants presently challenge. This is clearly a question of state law and policy, not federal law. Furthermore, the New York Legislature is currently evaluating proposals for a "discovery" type of statute of limitations concerning occupational diseases. It is respectfully submitted that it would be imprudent for this Court to impose its own judgment. The power of the state to regulate procedure of their own courts should be maintained.

CONCLUSION

Plaintiffs' appeal should be dismissed.

Respectfully submitted,

FRANK E. MAHER, P.C.
Attorney for Appellee
Celotex Corp.

Motion to Dismiss or Affirm

2

81-1614

No. A-664

Supreme Court, U.S.
FILED
APR 22 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

STANLEY ROSENBERG and BARBARA ROSENBERG, *et al.*,

Appellants,

v.

JOHNS-MANVILLE SALES CORPORATION, *et al.*,

Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

MOTION TO DISMISS

DOMINIC J. CORNELLA, P.C.
Counsel for Appellee Pittsburgh Corning Corporation
160 Broadway
New York, NY 10038
(212) 267-0880

Page

Question Presented.

Does a determination by a State's Highest Appellate Court as to the accrual date of a cause of action under that State's specific Statute of Limitations present such a material or substantial federal question for this Court to assume jurisdiction?

Parties to the Proceeding.

Stanley Rosenberg and Barbara Rosenberg, Plaintiffs-Appellants, against Johns-Manville Sales Corporation, Successor by Merger with Johns-Manville Products Corporation, Johns-Manville Sales Corporation and Johns-Manville Corporation, Unarco Industries, Raybestos-Manhattan, Inc., Owens-Corning Fiberglas Corp., Pittsburgh Corning Corporation, Eagle-Picher Industries, Inc., Westinghouse Electric Corp.,The Southern Asbestos Co., H. K. Porter Company, Inc., and Uniroyal, Inc., Defendants-Respondents. Action No. 1.

Jerome Brenner and Anita Brenner, Plaintiffs-Appellants, against Johns-Manville Sales Corporation, Successor by Merger with Johns-Manville Products Corporation, Johns-Manville Sales Corporation and Johns-Manville Corporation, Unarco Industries, Raybestos-Manhattan, Inc., Owens-Corning Fiberglas Corp., Pittsburgh Corning Corporation, Eagle-Picher Industries, Inc., Westinghouse Electric Corp., The Southern Asbestos Co., H. K. Porter Company, Inc., and Uniroyal, Inc., Defendants-Respondents. Action No. 2.

Dorothy Cohen, Administratix of the Estate of Emanuel Cohen, Plaintiff-Appellant, against Johns-Manville Products Corporation, Johns-Manville Sales Corporation, Johns-Manville Corporation, Unarco Industries, Raybestos-Manhattan, Inc., Owens-Corning

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Fiberglas Corp., Pittsburgh Corning Corporation, Eagle-Picher Industries, Inc., Asbestos Corp. of America, Eastern Refraction Company, Inc., Westinghouse Electric Corp., The Southern Asbestos Co., H. K. Porter Company, Inc., Alpha Assoc., Inc., Shook and Fletcher Insulation Company, Sepco Corporation, Uniroyal, Inc., and Cummings Insulation Co., Defendants-Respondents. Action No. 3.

Rose Failla, Administratrix of the Estate of Vincent Failla, Plaintiff-Appellant, against Johns-Manville Products Corporation, Johns-Manville Sales Corporation, Johns-Manville Corporation, Unarco Industries, Raybestos-Manhattan, Inc., Owens-Corning Fiberglas Corp., Pittsburgh Corning Corporation, Eagle-Picher Industries, Inc., Asbestos Corp. of America, Eastern Refraction Company, Inc., Westinghouse Electric Corp., The Southern Asbestos Co., H. K. Porter Company, Inc., Alpha Assoc., Inc., Shook and Fletcher Insulation Company, Sepco Corporation, Uniroyal, Inc., and Cummings Insulation Co., Defendants-Respondents. Action No. 4.

Joseph Ferrarese and Lena Ferrarese, Plaintiffs-Appellants, against Johns-Manville Sales Corporation, Successor by Merger with Johns-Manville Products Corporation, Johns-Manville Sales Corporation and Johns-Manville Corporation, Unarco Industries, Raybestos-Manhattan, Inc., Owens-Corning Fiberglas Corp., Pittsburgh Corning Corporation, Eagle-Picher Industries, Inc., The Southern Asbestos Co., H. K. Porter Company, Inc., Uniroyal, Inc., The Celotex Corporation and Colt Industries, Inc., Defendants-Respondents. Action No. 5.

Rose Weinberg, Administratrix of the Estate of Albert Weinberg, Plaintiff-Appellant, against Johns-Manville Products Corporation, Johns-Manville Sales Corpora-

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tion, Johns-Manville Corporation, Unarco Industries, Raybestos-Manhattan, Inc., Owens-Corning Fiberglas Corp., Pittsburgh Corning Corporation, Eagle-Picher Industries, Inc., Asbestos Corp. of America, Eastern Refraction Company, Inc., Westinghouse Electric Corp., The Southern Asbestos Co., H. K. Porter Company, Inc., Alpha Assoc., Inc., Shook and Fletcher Insulation Company, Sepco Corporation, Uniroyal, Inc., and Cummings Insulation Co., Defendants-Respondents. Action No. 6.

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No. A-664

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981.

STANLEY ROSENBERG and BARBARA ROSENBERG, *et al.*,

Appellants,

v.

JOHNS-MANVILLE SALES CORPORATION, *et al.*,

Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS.

MOTION TO DISMISS.

Jurisdiction.

Appellants purport to invoke jurisdiction pursuant to 28 USC 1257 (2) on the grounds that the validity of the New York Statute of Limitations as applied to a particular class of individuals was drawn in question by virtue of the alleged repugnance of that application to the Constitution of the United States and the decision of the New York Court of Appeals upheld the validity of the statute as applied.

Jurisdiction has never been assumed by this court where there has been a lack of material or substantial federal question. Traditionally, the scope and exclusivity of the state Statutes of Limitations have been left entirely up to the state legislatures and courts to both apply and construe their reasonableness. Federal Courts have refused to assume jurisdiction where it has been determined that the question is purely a state matter.

Statement of the Case.

In these specific cases plaintiffs allege causes of action in negligence, strict products liability, intentional torts and breach of warranties against the numerous defendant manufacturers, distributors, and suppliers of asbestos products. Plaintiffs contend they were injured from the inhalation of asbestos. The last exposure of any plaintiff was at the earliest sixteen years ago. The summonses are dated April, 1978.

Plaintiffs now appeal from an Order of the New York State Court of Appeals which upheld the lower court decisions dismissing their complaints for being time barred. It is their argument that as a class of people (having an asbestos related disease) their constitutional rights have been violated by the New York Court's application of the last exposure rule rather than the discovery rule in its interpretation as to when their causes of action accrued.

POINT I.

Jurisdiction should be denied for lack of a material federal question.

This distinguished Court is extremely cognizant of the necessity and essentiality of the existence of a material

federal question before it will apply its jurisdiction as a basis for review of a state court decision. Previously legalistic standards have been established to avoid the assumption of claims which are insubstantial, frivolous and destitute of merit in the realm of federal materiality. *Erie R. Co. v. Solomon,* 237 U.S. 427, 58 L. Ed. 1033, 35 S. Ct. 648; *Southern Pacific Co. v. Arizona,* 249 U.S. 472, 63 L. Ed. 713, 39 S. Ct. 313.

More precisely, the determination of the exact nature of a question presented in a particular case depends solely on the law rather than specific case precedents which are extremely limited in their application and force by the particular facts and circumstances of an individually referenced case. In rendering its determinations of legal rationale this Court has been thoroughly consistent and steadfast. Unless a particular class will be unreasonably and detrimentally excluded, the Courts have left the question to the State Courts for determination.

We should note that the first general enactment with respect to Statute of Limitations applicable to personal and real actions was passed in 1623 by Statute 21 JAC. Ic. 16, known since as the Statute of Limitations 2 Bouv., Law Dict. Rawle's Third Revision, page 1998 (1914). Generally speaking, the Federal Courts have defined the meaning of Statute of Limitation.

> "Preliminarily, we note that a Statute of Limitation is a restriction on the time within which a party may institute proceedings in an appropriate court. The limitations do not affect the 'merits' of the controversy or the underlying right to recover but rather are directed toward setting the time when resort must be had to the court." *United States v. Franklin Studivant,* 529 F.2d 673 at page 675 (1976).

> "Statutes of limitations are enacted as expression of public policy to encourage promptness in bringing actions and do away with stale claims." *Spikes v. Mittry Construction Co.*, 295 F. 2d 207. "As a matter of Constitutional Law, Statutes of Limitations go to matters of remedy and do not involve destruction of fundmental rights." *Lucia v. United States*, 474 F. 2d 565. "Statutes of Limitations are statutes of repose and * * * must be construed strictly to that end." *Barnes v. Sears & Roebuck & Co.*, 406 F. 2d 859.

Basically the states have applied four different theories as to the accrual of a cause of action under the Statute of Limitations: (1) The period limiting actions to recover for all harm may commence upon the occurrence of the first invasion of a plaintiff's rights; (2) Each continuation or repetition of the wrongful conduct may be regarded as a separate cause of action for which suit must be brought within the period beginning with its occurrence; (3) The period for all harm may not commence until the defendant ceases his wrongful conduct; and (4) The period for all harm may be postponed until there is a manifestation of compensable harm. See 43 Harv. L. Rev., page 1205. The Courts of New York State follow the second enunciated theory, i. e., the cause of action begins to accrue on the date of the last occurrence (the exposure theory).

To hold New York State's Statute of Limitations unconstitutional would bring into issue the various statutes of repose in all other state jurisdictions and each individual state's interpretation of remedial rights accruing under their statutes.

The New York Statute in question applies to a large class of prospective litigants. It is not geared nor should it

be restricted to only asbestos related litigants. The overwhelming majority of causes of action sounding in strict liability for negligence and breach of warranty fall well within the confines of the statutes. Asbestos litigants are exceptions to the general application of the New York State Statute of Limitations. They are a class peculiar and non derivative of the traditional cause of action. The statutory limitations of New York and other jurisdictions encompass a broad classification and not a restrictive class.

> "A Statute of Limitations must be judged in the light of the broad class of cases to which it applies and if it is reasonable with respect to the class, it will not be judged unreasonable merely because it is deemed to operate harshly in a particular or exceptional instance." *Hargraves v. Brackett Stripping Machine Co.*, 317 F. Supp. 676 at page 683 (1970).

This court has often expressed its views towards Statutes of Limitations and repeatedly left the question of their interpretation and applicability to the State Courts and their legislatures.

> "Statutes of Limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principals. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost." *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349.

> "They are by definition arbitrary and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control." *Chase Securities Corp. v. Donaldson,* 325 U.S. 304, 315.

Most recently pronounced expressions of opinion were stated in *United States v. Kubrick,* 444 U.S. 111, 124 (1979).

> "It goes without saying that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or are applicable. We should give them effect in accordance with what we can ascertain the legislative intent to have been." *U.S. v. Kubrick, supra.*

Likewise the purpose of these statutes is not merely to protect litigators but also defendants and the Courts from the justiciable impairments fostered by the passing of time. *Order of Railroad Telegraphers v. Railway Express Agency, supra; Missouri Kansas & Texas R. Co. v. Harriman,* 227 U.S. 657 (1913).

> "Statutes of Limitations are primarily designed to assure fairness to defendants. Such statutes 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.' The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that right to be free of stale claims in time comes to prevail over the right to prosecute them." *Burnett v. New York Central R. Co.*, 380 U.S. 424, 428 (1965).

However, Statutes of Limitations have never given rise to a material federal question but left to the state legislatures the application of a standard of reasonableness in prescribing and fixing the limitations of actions.

> "In all such cases, the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under the circumstances, reasonable. Of that the legislature is primarily the judge; and we cannot overrule the decision of that department of the government, unless a palpable error has been committed. In judging of that, we must place ourselves in the position of the legislators, and must measure the time of limitation in the midst of the circumstances which surround them, as nearly as possible; for what is reasonable in a particular case depends upon its particular facts." *Terry v. Anderson,* 95 U.S. 628, 24 L. Ed. 365 (1877).

> "What shall be considered a reasonable time must be settled by the judgment of the legislature." *Wilson v. Iseminger,* 185 U.S. 55, p. 63, 22 S. Ct.

> 573, 46 L. Ed. 804 (1902). "The acts from which the time limited shall begin to run will generally depend on the sound discretion of the legislature." *Jackson v. Lamphire,* 28 U.S. 280, 289 (1830).

It is apparent that such remedies as state Statutes of Limitations have been left exclusively to the realm and domain of state legislation.

> "The parties to a contract have no more a vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remain." *Wilson v. Iseminger, supra.*

Ths Court has decided the pertinence of the materiality of a federal question in relation to a state Statute of Limitation. In an 1896 decision of this Court which has never been reviewed, the rule which still stands as the law of the case was enunciated:

> "The limitation of actions is governed by the *lex fori,* and is controlled by the legislation of the State in which the action is brought, as construed by the highest court of that State, even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions. * * * The question of what time the cause of action accrued in this case within the meaning of the statute of limitations of Iowa, *was not a Federal question,* but a local question, upon which judgment of the

> highest court of the State cannot be reviewed by this court." *Great Western Telegraph Co. v. Purdy,* 162 U.S. 329, 339, 40 L. Ed. 986, 16 S. Ct. 810 (1896). (Emphasis supplied.)

It is ironic that the decision of the New York State Court of Appeals, from which appellant now appeals, in affirming that State's interpretation of the Statute of Limitations, left the questions pertaining to the accrual of causes of action up to the State Legislature. "We believe it to be inappropriate and injudicious to intrude into an area best suited for legislative scrutiny." *Rosenberg, et al., v. Johns-Manville Sales Corporation, et al.,* 54 N. Y. 2d 1008, 1011 (1981).

Finally, *Urie v. Thompson,* 337 U.S. 163, 69 S. Ct. 1018, as cited by the appellants, does not apply in this situation. The *Urie* case involved the Federal Employees Liability Act, and the Court's interpretation of the accrual date for a cause of action within the Federal Statute. Even so, the Court looked to the intent of the legislative body (Congress) in interpreting that particular piece of federal legislation. "And nothing in either the language or the legislative history discloses expressly any intent to exclude from the Act's coverage any injury resulting 'in whole or in part from the negligence' of the carrier." *Urie v. Thompson, supra,* 181.

Paradoxically, *Urie* is one of the very few decisions where a substantial or material federal question was involved in the interpretation of a statute of limitation. Merely, because it involved a federal statute. Correspondently, this court has persistently and invariably rejected the attribution of federal substantialness to local statutes of legal accrual restrictions. Appropriately, matters of constitutionality have been repudiated with regard to state limitation statutes and left entirely up to the state legislative bodies.

CONCLUSION.

Appellants' appeal should be dismissed in all respects for lack of jurisdiction.

Respectfully submitted,

DOMINIC J. CORNELLA
Counsel for Appellee
Pittburgh Corning Corporation
160 Broadway
New York, N. Y. 10038

Motion to Dismiss or Affirm

3

81-1614

Supreme Court, U.S.
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No. A-664

IN THE

Supreme Court of the United States

October Term, 1981

STANLEY ROSENBERG and BARBARA ROSENBERG, *et al.*,

Appellants,

v.

JOHNS-MANVILLE SALES CORPORATION, *et al.*,

Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

MOTION TO DISMISS

CLARK, GAGLIARDI & MILLER, P.C.
Attorneys for Appellees Johns-Manville
99 Court Street
White Plains, NY 10601
(914) 946-8900

Questions Presented.

Does the claim that a statute is being applied in a constitutionally discriminatory fashion entitle appellant to appeal as of right to the Supreme Court of the United States?

Is a substantial federal question presented by the assertion that the constitutional rights of appellants and other members of their class are violated by the application of the New York statute of limitations which accrues upon the date of injury/exposure?

Does the New York Court's determination that the statute of limitations runs from the date of the injury which occurs at the time of exposure violate plaintiffs' constitutional rights?

Is a discovery rule constitutionally required whenever a person suffers an injury which is not discovered until a later time?

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No. A-664

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STANLEY ROSENBERG and BARBARA ROSENBERG, *et al.*,

Appellants,

v.

JOHNS-MANVILLE SALES CORPORATION, *et al.*,

Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS.

MOTION TO DISMISS.

Jurisdiction.

Appellants purport to invoke jurisdiction pursuant to 28 USC 1257 (2) on the grounds that the validity of the New York Statute of Limitations as applied to a particular class of individuals was drawn in question by virtue of the alleged repugnance of that application to the Constitution of the United States and the decision of the New York Court of Appeals upheld the validity of the statute as applied.

Reliance upon this section of the United States Code is misplaced. The claim that a statute is being applied in a constitutionally discriminatory fashion allows review by certiorari only (*Charleston v. Federal Savings and Loan Association v. Alderson,* 324 US 182, 65 S.Ct. 624, 89 L.Ed. 857 [1944]).

Furthermore, the unsubstantial character of the question presented requires that jurisdiction properly be denied.

Statement of the Case.

The plaintiffs allege causes of action in negligence and strict products liability against the defendant manufacturers and suppliers of asbestos. It has been conceded that the last exposure of any of the plaintiffs or their decedents was more than three years before the institution of these actions. In fact, the last claimed exposure to asbestos of any of the plaintiffs or their decedents was at the latest sixteen years ago. Some have not been exposed for over thirty years.

The plaintiffs in these product liability actions appeal from an order of the New York State Court of Appeals which dismissed their complaints as barred by the statute of limitations. It is their contention that the date of exposure rule sanctioned by the highest court of the state must be abrogated and a discovery rule instituted in its stead by virtue of the fact that the present judicial construction has deprived a particular class of people (those injured by asbestos) of their constitutional rights.

POINT I.

Appellants are not entitled to appeal to the Supreme Court as of right.

It is the contention of appellants that:

> "New York has construed its statute of limitations (CPLR 214) in such a way as to deprive a particular class of people (those injured by asbestos) of their constitutional rights of due process and trial by jury" (see appellants' brief, p. 12).

Although it appears that a claim that a statute is invalid as applied to a particular situation is sufficient to invoke jurisdiction by appeal (*Dahnke-Walker Milling Co. v. Bondurant,* 257 US 282, 42 S.Ct. 106, 66 L.Ed. 239 [1921]), the claim that a statute is being applied in a constitutionally discriminatory fashion allows review by certiorari only (*Zucht v. King,* 260 US 174, 43 S.Ct. 24, 67 L.Ed. 194 [1922]; see also *Charleston Federal Savings & Loan Association v. Alderson,* 324 US 182, 65 S.Ct. 624, 89 L.Ed. 857 [1944]).

Thus by alleging that the New York statute of limitations is being applied so as to deprive a definable class of citizens (to wit: those injured by asbestos)[1] of their constitutional rights, appellants may seek review by writ of certiorari only. Under these facts, 28 USC 1257(2) does not apply.

---

[1] There obviously is no suspect classification involved in the cases at bar since the date of exposure rule applies to anyone who failed to sue within the time required (*San Antonio v. Rodriquez,* 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed. 2d 16 [1973]).

Indeed, this Court denied a petition for a writ of certiorari in the case of *Schwartz v. Heyden Newport Chemical Corp.*, 12 NY2d 212, remittitur amended 12 NY2d 1073, cert. den. 374 US 808, 83 S.Ct. 1697, 10 L.Ed. 2d 1032. *Schwartz* involved questions of law virtually indistinguishable from those presented in the instant appeal.

In *Schwartz*, a product called "Umbrathor," manufactured by the defendant, was inserted into plaintiff's sinuses for the purpose of making them perceptible in X-rays. Some of the substance allegedly remained in plaintiff's head and produced a carcinoma requiring the removal of an eye 13 years later. The action was commenced two years after the surgery, 15 years after the injection of the umbrathor.

The New York Court of Appeals held that the applicable statute of limitations barred plaintiff's recovery, thereby reasserting its express rejection of discovery rule. *Id.* at 216. Thus in *Schwartz* as in the instant appeals, the injury produced concurrently with the invasion of the body was adjudged to commence the statute of limitations.

The remittitur as amended in *Schwartz* (12 NY2d 1073) allows no doubt that the precise constitutional issues raised in the instant appeals were likewise asserted therein. Nevertheless, this Court denied plaintiff's petition for writ of certiorari (374 US 808, 83 S.Ct. 1697, 10 L.Ed. 2d 1032).

It is respectfully suggested that the same result is indicated in the appeals at bar.

POINT II.

Jurisdiction should properly be declined for want of a substantial federal question.

It is well settled that even when technical compliance with 28 USC 1257(2) has been satisfied by appellants (a situation not existing in the instant appeal), a substantial federal question must still be presented. In the words of Mr. Justice Brandeis: "[A]lthough the validity of a law was formally drawn in question, it is our duty to decline jurisdiction whenever it appears that the constitutional question presented is not . . . substantial in character." *Zucht v. King*, 260 US 174, 43 S.Ct. 24, 67 L.Ed 194 (1922). As in *Zucht*, no such substantial question has been presented in the instant appeal.

The inherent nature of statutes of limitations as emphasized by this Court's approach to their application and analysis of their function leaves no doubt that they operate, where necessary, to extinguish procedural remedies, not substantive rights.

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. (Citation omitted.) They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the

> privilege to litigate. *Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual.* (Emphasis supplied.)

Chase Securities Corp. v. Donaldson, 325 US 304, 315 (1944).

This approach to statutes of limitations has been adopted by the Supreme Court as a "working hypothesis" and as a matter of constitutional law (*id.* at 314).

The abstract logic of the distinction between substantive rights and remedial or procedural rights, although at times difficult to apply, has been found to be a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value (*Chase, supra,* at 314). Clearly, this case involves the latter situation, as there is no need for nationwide uniformity in the area of state statutes of limitations (see generally *Board of Regents of the University of the State of New York v. Tomanio,* 446 US 478, 100 S.Ct. 1790, 64 L.Ed. 2d 440 [1980]).

Thus no question of a substantial character has been presented in the instant appeal. Appellants contend that the application of the New York statute of limitations has deprived them and other members of their class of their constitutional rights. At the very most, such rights are procedural in character and do not qualify as substantive in any sense. This Court has consistently maintained both the wisdom and the necessity of this distinction.

Furthermore, it is beyond dispute that access to the court is not, in and of itself, an independent constitutional right (*Ortwein v. Schwab,* 410 US 656, 93 S.Ct. 1172, 35

L.Ed. 2d 572 [1973]; see also *United States v. Kras*, 409 US 434, 93 S.Ct. 631, 34 L.Ed. 2d 626 [1973]). Thus, denial of such access by virtue of the application of the New York statute of limitations does not constitute violation of a fundamental right.

For these reasons, jurisdiction should properly be denied in the instant appeal for want of a substantial constitutional question.

POINT III.

The adoption of a date of discovery rule in all state statutes of limitations is not required by the federal constitution.

It is fundamental that the establishment of statutes of limitation is always a legislative prerogative (*Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628 [1944]). Furthermore, the right to prescribe within what time and upon what conditions suits can be commenced and maintained is fully within the power of the state (*Wood v. Cheesborough*, 228 US 672, 33 S.Ct. 706, 57 L.Ed. 1018 [1913]). The time within which to bring an action is a matter of legislative grace and is subject to legislative control (see generally *Chase, supra* at 325 US 314).

In New York, CPLR §214 provides:

> "The following actions must be commenced within three years:
>
> * * *
>
> 5. An action to recover damages for a personal injury."

The courts of New York have construed this statute to mean that the causes of action dismissed on the instant appeal accrued at the time of the invasion of the body, the time at which the injury actually occurred. In these cases, that invasion was at the latest sixteen years ago, and in some cases 35 years ago. This approach represents a sound policy decision founded upon a careful balancing of all the competing considerations. The myriad and obvious difficulties in defending such product liability actions involving exposures consummated in the dim and distant past require no elaboration. Indeed, this Court recently articulated once again its philosophy regarding the purpose and function of statutes of limitations when it said that they

> "are made for the repose of society and the protection of those who may during the limitation have lost their means of defense." *United States v. Marion,* 404 US 307, 92 S.Ct. 455, 30 L.Ed. 2d 468 [1971].

Simply put, there comes a time when the manufacturer may legitimately expect peace of mind, and when "it is unfair to require the defendant to piece together his defense to an old claim" (*Walker v. Armco Steel Corp.,* 446 US 740, 100 S.Ct. 1978, 64 L.Ed. 2d 659 [1980]).

There is nothing unique about the New York statute of limitations. The time within which to bring a tort claim for personal injury almost universally accrues at the time of the injury. The injuries to these plaintiffs or their decedents occurred at the time of exposure (Selikoff Bader, *et al., Editorial: Asbestos and Neoplasin,* Amer. J. Medicine, 42:487-496 [1967]). The fact that a person may not know of his injury until some later time does not alter when the injury occurs, and when the statutory time begins to run.

Some states have established a discovery rule in latent disease cases. The fact that the New York Court has chosen to leave any change to the legislature is a policy decision about the privilege to litigate in that state. There is no constitutional deprivation merely because the Court chose not to invoke a discovery rule. The decision is purely a matter of state concern.

If plaintiffs' contentions are true, a discovery rule is constitutionally required any time a person suffers injury not discovered until a later time.

In sum, there is no federal question involved. What is involved is the right of the New York Court to determine that it will not invoke a discovery rule in latent disease cases.

CONCLUSION.

Plaintiffs' appeal should be dismissed.

Respectfully submitted,

CLARK, GAGLIARDI & MILLER, P.C.
Attorneys for Appellees Johns-
Manville Sales Corp.
The Inns of Court
99 Court Street
White Plains, N.Y. 10601

Of Counsel:
LAWRENCE T. D'ALOISE, JR.

Motion to Dismiss or Affirm

4

NO. 81-1614

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STANLEY ROSENBERG and
BARBARA ROSENBERG, *et al.*,

Appellants,

v.

JOHNS-MANVILLE SALES CORPORATION, *et al.*,

Appellees.

[AND FIVE OTHER ACTIONS]

On Appeal from the New York Court of Appeals

MOTION TO DISMISS APPEAL

FRANKLIN N. MEYER
MORGAN, MELHUISH,
MONAGHAN & MEYER
Attorneys for Appellee Raybestos-Manhattan, Inc.
Two World Trade Center
Suite 1844
New York, New York 10048
(212) 938-5900

GEORGE R. HINCKLEY
JAVITS & JAVITS
Attorneys for Appellee Owens Corning Fiberglas Corp.
1345 Avenue of the Americas
New York, New York 10105
(212) 586-4050

Questions Presented

1. When Appellants asserted no Federal challenge to any state statute before the New York Courts, but drew into question only a judge made accrual rule, can an appeal from said State court judgment be had, in light of the express limitations set forth in Title 28 U.S.C. §1257(2)?

2. Is review by this Court available when the judgment from which review is sought relates solely to a State's power to prescribe the time in which suits may be brought in its Courts and no substantial Federal question is involved?

3. May appellants properly ask this Court to substitute its judgment for the judgment and public policy of the State of New York in an area plainly reserved to state power and authority?

---

* In compliance with rule 28.1 of the rules of this Court, appellee, Raybestos-Manhattan, Inc., states that the following are non-wholly owned subsidiaries or affiliates: Daikin-R/M Co. Ltd. (Joint Venture), Interserco Ltd., Celestial Ltd., Itapsa (Joint Venture), Modulus International, Modform Illinois, Inc., Modform Ohio, Inc., Minette Mills, Inc., Minette Corporation, Minette Sales Corporation, Radnor Television Corp., Modform Moline, Inc., Precision Cold Forged Products, Inc., and the Milford Rivet & Machine Co. of Delaware, Inc.

Appellee, Owens Corning, Fiberglas Corp., states that the following are non-wholly owned subsidiaries or affiliates: Bayer-Owens-Corning Glass Wool, S.A. (Belgium), Veroc Technology A.S. (Norway), Fiberglas Canada, Inc., Fiberglas Columbia, S.A., Owens Corning Fiberglas Espania, S.A., Scandinavian Glasfiber, Aktiebolag, Vitro-Fibras, S.A. (Mexico), Eurostar, S.A. (France), Polyplaster, S.A. (Brazil), Amiantit, Fiberglass Industries, Ltd. (Saudi Arabia), Asahi Fiber Glass Company, Ltd. (Japan) and Polyarm, S.A.

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United States Supreme Court Rule 17 6

NO. 81-1614

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

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BARBARA ROSENBERG, *et al.*,

Appellants,

v.

JOHNS-MANVILLE SALES CORPORATION, *et al.*,

Appellees.

[AND FIVE OTHER ACTIONS]

On Appeal from the New York Court of Appeals

MOTION TO DISMISS APPEAL

Jurisdiction

Appellants seek to take an appeal from the decision of the New York State Court of Appeals solely pursuant to Title 28 U.S.C. §1257(2).

Appellants reliance on this provision is wholly misplaced, since this provision permits appeal *only* when a State *statute* is called into question as being violative of the Constitution, treaties or laws of the United States, before the highest Court of any State. This was *not* done here.

As such there is no right of appeal herein. Moreover, no substantial Federal question is presented. Rather the issues relate solely to matters of state law and policy, in areas which this Court has consistently held are proper concerns of the state rather than of the Federal government. Accordingly, the within appeal should be dismissed in all respects.

Statement of the Case

Appellants brought suit seeking recovery for disease which purportedly arose as a consequence of injury by invasion of asbestos fibers, which occurred literally decades ago. Causes of action were alleged in negligence, and strict products liability.*

Appellants in these actions appeal from the order of the New York State Court of Appeals which affirmed the dismissal of their complaints as barred by the New York Statute of Limitations. Before the New York Courts, appellants challenged only the judge made accrual rule with respect to the running of the statute of limitations, but did not challenge the statute itself.

---

* Appellants initially pleaded claims in breach of warranty but thereafter conceded that such claims were barred under the New York statute of limitations.

POINT I

Since no Federal challenge was ever raised to any State Statute before the New York Court of Appeals, plaintiff has no right of appeal herein.

The right of appeal to this Honorable Court from a final judgment of the highest Court of any state is expressly limited by Title 28 U.S.C. 1257(2).

This provision provides a right of appeal in such cases only:

> "where is drawn in question *the validity of a statute* of any state on the ground of it being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." (emphasis added)

In the matter at bar, no such challenge was ever made to *any state statute* before the New York State Courts.

On the contrary, the challenge before the New York State Courts was made *solely* to the New York judge made accrual rule. This rule provides that a statute of limitations period for claims regarding an alleged deleterious substance, begins to run upon the last exposure to such substance and not any later date.

Such rule has been *judicially created* by the New York Courts, having been repeatedly reaffirmed by the New York State Court of Appeals for more than 40 years, ever since it was first announced by said court in *Schmidt* v. *Merchants Dispatch Transportation Company*, 270 N.Y. 287, 300, 200 N.E. 824, 827 (1936). The rule is wholly non-statutory.

Furthermore, appellants, before the New York Court of Appeals, made plain they were challenging *only the*

judge made accrual rule (which they termed the "Schmidt-exposure rule"), and not any state statute. At page 44 of appellants' brief to the New York Court of Appeals in the case at bar, appellants stated:

> "Particularly where the courts are responsible for introducing a principle into our law (as is the case here), they must see that the rule of their making conforms to reality and the constitutional requirements of due process.
>
> The *Schmidt*—date of exposure rule—was decided in this Court and not in the Legislature. If it is erroneously followed here that too will be a judicial decision. Legislative action or inaction is irrelevant to the vitality of judge made law. The misapplication of common law principles should now be corrected by adjudication."

This Court has consistently held that an appeal will not lie unless a state statute's validity is timely and explicitly drawn into question before the highest court of the State. *Wilson* v. *Cook,* 327 U.S. 474, 66 S.Ct. 663 (1946), *Charleston Federal Savings and Loan Ass'n* v. *Alderson,* 324 U.S. 182, 65 S.Ct. 624 (1945); *Richmond Newspapers, Inc.* v. *Virginia,* 448 U.S. 555, 100 S.Ct. 2814 (1980).

The holding of this Court in *Wilson* v. *Cook,* 327 U.S. 474, 480, 66 S. Ct. 663, 666 (1945) is of direct application:

> [W]e are without jurisdiction of the appeal * * * unless there was "drawn in question" before the Supreme Court of Arkansas "the validity of a statute" of the state "on the ground of its being repugnant to the Constitution. . . . or laws of the United States." The purpose of this requirement is to re-

> strict our mandatory jurisdiction on appeal * * * This jurisdictional requirement is satisfied only if the record shows that the question of the validity under federal law of the state statute, as construed and applied, has either been presented for decision to the highest court of the state. *Wall* v. *Chesapeake & Ohio R. Co.*, 256 U.S. 125, 126; *Citizens National Bank* v. *Durr*, 257 U.S. 99, 106, or has in fact been decided by it, *Nickey* v. *Mississippi*, 292 U.S. 393, 394; *Whitfield* v. *Ohio*, 297 U.S. 431, 435-6, and that its decision was necessary to the judgment. *Cuyahoga Power Co.* v. *Northern Realty Co.*, 244 U.S. 300, 304 and cases cited. The record in this case does not disclose that at any time in the course of the proceedings in the state courts plaintiffs asserted the invalidity of a state statute on any federal ground."

Moreover, this Court has similarly held that a statute's validity is not properly drawn into question for purposes of appeal if only the validity of its interpretation or its application to the facts at bar are challenged. *Charleston Federal Savings and Loan Ass'n.* v. *Alderson*, 324 U.S. 182, 65 S. Ct. 624 (1945); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 100 S. Ct. 2814 (1980).

In the matter at bar Appellants did not in any sense challenge a statute on Federal grounds in the State Court. Accordingly, the within appeal should be dismissed pursuant to Title 28 U.S.C. 1257(2).

POINT II

No substantial Federal question is presented, and accordingly the appeal should be dismissed.

It is well settled that there can be no review by this Court of the judgments of the highest Court of a State unless appellants meet their burden of proving that a substantial Federal question is presented. This is plainly the law even where appellants have satisfied the requirements for appeal (which as indicated above they have not even done here). In *Zucht* v. *King, et al.*, 260 U.S. 174, 43 S.Ct. 24 (1922) for example, Judge Brandies reiterated this Court's "duty to decline jurisdiction whenever it appears that the constitutional question presented is not * * * substantial in character."

The standard appears even more severe, if appellants' application is deemed a petition seeking writ of certiorari. Rule 17 of the Rules of this Court expressly provides no such writ will be granted unless "there are special and important reasons therefore."

The within appeal raises no substantial Federal question or any "special" or important Federal concerns. Rather it relates solely to a state's power to prescribe the time in which suits may be brought in its Courts.

This Court has consistently held that this raises no substantial Federal question or furnishes any basis for review by this Court. "[C]ertainly the application * * * [of] the statute of limitations does not present a Federal question. *Gaar Scott & Co.* v. *Shannon*, 233 U.S. 468; *Preston* v. *Chicago*, 226 U.S. 447, 450." *Wood* v. *Chesbrough*, 228 U.S. 672, 677, 33 S. Ct. 706 (1912). "As it involved only a question of pleading and practice under the laws of the State it is not subject to review by us."

Brinkmeier v. *Missouri Pacific Railway Co.*, 224 U.S. 268, 270, 32 S.Ct. 412, 413 (1912).

Moreover, this Court has consistently recognized that a state's statutes of limitation represent the public policy of a state as to the privilege to litigate, which is well within its right and authority. As this Court observed in *Chase Securities* v. *Donaldson*, 325 U.S. 304, 314, 65 S. Ct. 1137, 1142 (1945) in discussing statutes of limitations:

> "They are practical and pragmatic devices to spare the Courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 349. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. * * * They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called 'fundamental' right or what used to be called the 'natural' right of the individual."

The New York accrual rule which appellants seek to attack on this appeal, of course, reflects a value judgment concerning the point at which the interests in favor of preserving claims are outweighed by principles of repose, and the passage of time which makes impossible the proper proof or defense of matters occurring literally decades ago. The latter considerations are of compelling significance here. In these cases, the alleged injurious invasions occurred not less than 16 years ago, and in some cases more than 35 years ago. The obvious and numerous difficulties of defending such product liability actions where alleged exposure and all surrounding circumstances

were completed literally decades ago are plain on their face. It is in matters such as these that statutes of limitations were intended to apply.

In no sense do the cases cited by appellants at pp. 8-9 of their brief lend them any comfort. Rather each expressly upheld the power and authority of the states to adopt limitations periods in accordance with their own public policies. Moreover appellants citation to the sole dissent in *Dincher* (without advising this Court of same) is plainly overshadowed by the actual decision of the Court which again expressly upheld the authority of the state with respect to its own statutes of limitation. The *Urie* case is similarly inapposite because it involved the construction of 2 Federal statutes; The Federal Employers Liability Act and the Federal Boiler Inspection Act and not any state statute of limitations. Nor does the New York accrual rule discriminate between citizens and non-citizens as in the *Canadian Northern Railway* case cited by appellants and accordingly such case is similarly inapposite.*

It is thus evident that no substantial Federal question is presented here; only matters of state law and policy in an area of exclusive state concern and authority. There is, accordingly, no basis for review herein and the within motion to dismiss should be granted in all respects.

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* In addition, appellants claim that they have been denied a right to a jury trial on the issue of when an injury is sustained for statute of limitations purposes is also without merit. The hearing which appellants claim they should have would be meaningful only if the applicable accrual Rule were different, i.e., that an injury is sustained upon its discovery, not upon the date of last exposure. Accordingly, appellants are effectively doing no more than merely reasserting their argument that New York's accrual rule denies them due process of law.

In fact, this Court has previously denied a writ of certiorari in another matter which sought to challenge the New York accrual rule, and which raised precisely the same issues which appellants now advance. See *Schwartz* v. *Heyden Newport Chemical,* 12 N.Y.2d 212, remittitur amended 12 N.Y.2d 1073, cert. denied 374 U.S. 800, 83 S. Ct. 1697 (1963).

In *Schwartz,* appellant claimed to have developed cancer by reason of a substance which had been placed in his sinuses to make them perceptible in x-rays, approximately 15 years before.

The New York Court of Appeals held that plaintiff's claims were barred under the New York Accrual rule and statute of limitations. It further expressly rejected any date of discovery concept. 12 N.Y.2d at 216.

The remittitur as amended in *Schwartz* (12 N.Y.2d 1073) makes it plain that precisely the same questions presented here were raised in *Schwartz.* This Court, of course, denied plaintiff's petition for writ of certiorari in *Schwartz.*

The same result is plainly called for here.

POINT III

By this appeal, appellants ask this Court to substitute its judgment for the judgment and public policy of the State of New York, in an area plainly reserved to State power and authority.

As indicated above, New York, as a matter of its State public policy for nearly a half century, has followed the New York Accrual rule which holds that claims for injury arising out of inhalation or ingestion of a substance accrues for statute of limitations purposes upon the inhalation or ingestion of the substance, and not any later date.

This New York accrual rule which appellants challenge here, represents a balance struck between competing societal interests and considerations.

Other States have struck different balances in these areas. Certain States have adopted a discovery concept with respect to the running of a statute of limitations. Other states in an effort to balance these competing societal interests and to prevent the manifest unfairness of having 1980's values, knowledge and hindsight apply to conduct which occurred in the 1930's and 1940's, have adopted statutes of repose which bar claims after a certain number of years have elapsed since a product leaves the custody of a manufacturer.*

By this appeal, appellants ask this Court to substitute its judgment for the judgment and public policy of the State of New York in this area.

But these are questions wholly of State law and policy, not Federal law. Nor does the U.S. Constitution designate that the balance of these competing State interests be struck in any particular manner. These are matters within the exclusive competence, purview and authority of the States. Nor do appellants submit anything to the contrary.

The within motion to dismiss should be granted in all respects.

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* *Statute of Repose.* See, for example, Fla. Stat. Ann. §95.031 (1979) (12 years from the date of delivery of the completed product); Ill. Ann. Stat. Ch. 83 §22.2(b) (Supp. 1979) (action based on strict liability in tort must be brought within 12 years from the date of sale to a seller or 10 years from the date of sale to the consumer; Ind. Code Ann. §34-4-20A-5 (Burns Supp. 1979) (10 yrs. after delivery of the product to the initial user); Utah Code Ann. §78-15-3 (1977) (Six years after the initial purchase or 10 yrs. after the date of manufacture).

CONCLUSION

The within appeal should be dismissed.

Respectfully submitted,

FRANKLIN N. MEYER
MORGAN, MELHUISH,
MONAGHAN & MEYER
Attorneys for Appellee Raybestos-Manhattan, Inc.
Two World Trade Center
Suite 1844
New York, New York 10048
(212) 938-5900

GEORGE R. HINCKLEY
JAVITS & JAVITS
Attorneys for Appellee Owens Corning Fiberglas Corp.
1345 Avenue of the Americas
New York, New York 10105
(212) 586-4050

Motion to Dismiss or Affirm

5

NO. 81-1614

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STANLEY ROSENBERG and
BARBARA ROSENBERG, *et al.*,

Appellants,

v.

JOHNS-MANVILLE SALES CORPORATION, *et al.*,

Appellees.

On Appeal from the New York Court of Appeals

MOTION TO DISMISS

IRWIN H. HAUT
MORRIS, DUFFY, IVONE & JENSEN
Attorney for Appellees, H. K. Porter Company and Southern Asbestos Company in Actions Numbered 1, 2 and 5
233 Broadway—41st Floor
New York, New York 10279
(212) 766-1888

Questions Presented

1. Have the appellants properly invoked the jurisdiction of this Court pursuant to 28 U.S.C. 1257 (2)?

2. Is a substantial federal question presented by the appellants?

Parties to the Proceeding

Stanley Rosenberg and Barbara Rosenberg, Plaintiffs-Appellants, against Johns-Manville Sales Corporation, Successor by Merger with Johns-Manville Products Corporation, Johns-Manville Sales Corporation and Johns-Manville Corporation, Unarco Industries, Raybestos-Manhattan, Inc., Owens-Corning Fiberglas Corp., Pittsburg Corning Corporation, Eagle-Picher Industries, Inc., Westinghouse Electric Corp., The Southern Asbestos Co., H. K. Porter Company, Inc., and Uniroyal, Inc., Defendants-Respondents. Action No. 1.

Jerome Brenner and Anita Brenner, Plaintiffs-Appellants, against Johns-Manville Sales Corporation, Successor by Merger with Johns-Manville Products Corporation, Johns-Manville Sales Corporation and Johns-Manville Corporation, Unarco Industries, Raybestos-Manhattan, Inc., Owens-Corning Fiberglas Corp., Pittsburgh Corning Corporation, Eagle-Picher Industries, Inc., Westinghouse Electric Corp., The Southern Asbestos Co., H. K. Porter Company, Inc., and Uniroyal, Inc., Defendants-Respondents. Action No. 2.

Dorothy Cohen, Administratrix of the Estate of Emanuel Cohen, Plaintiff-Appellant, against Johns-Manville Products Corporation, Johns-Manville Sales Corporation, Johns-Manville Corporation, Unarco Indutries, Raybestos-Manhattan, Inc., Owens-Corning Fiberglas Corp., Pittsburg Corning Corporation, Eagle-Picher Industries, Inc., Asbestos Corp. of America, Eastern Refraction Company, Inc., Westinghouse Electric Corp., The Southern Asbestos Co., H. K. Porter Company, Inc., Alpha Assoc., Inc., Shook and Fletcher Insulation Company, Sepco Corporation, Uniroyal, Inc., and Cummings Insulation Co., Defendants-Respondents. Action No. 3.

Rose Failla, Administratrix of the Estate of Vincent Failla, Plaintiff-Appellant, against Johns-Manville Products Corporation, Johns-Manville Sales Corporation, Johns-Manville Corporation, Unarco Industries, Raybestos-Manhattan, Inc., Owens-Corning Fiberglas Corp., Pittsburgh Corning Corporation, Eagle-Picher Industries, Inc., Asbestos Corp. of America, Eastern Refraction Company, Inc., Westinghouse Electric Corp., The Southern Asbestos Co., H. K. Porter Company, Inc., Alpha Assoc., Inc., Shook and Fletcher Insulation Company, Sepco Corporation, Uniroyal, Inc., and Cummings Insulation Co., Defendants-Respondents. Action No. 4.

Joseph Ferrarese and Lena Ferrarese, Plaintiffs-Appellants, against Johns-Manville Sales Corporation, Successor by Merger with Johns-Manville Products Corporation, Johns-Manville Sales Corporation and Johns-Manville Corporation, Unarco Industries, Raybestos-Manhattan, Inc., Owens-Corning Fiberglas Corp., Pittsburgh Corning Corporation, Eagle-Picher Industries, Inc., The Southern Asbestos Co., H. K. Porter Company, Inc., Uniroyal, Inc., The Celotex Corporation and Colt Industries, Inc., Defendants-Respondents. Action No. 5.

Rose Weinberg, Administratrix of the Estate of Albert Weinberg, Plaintiff-Appellant, against Johns-Manville Products Corporation, Johns-Manville Sales Corporation, Johns-Manville Corporation, Unarco Industries, Raybestos-Manhattan, Inc., Owens-Corning Fiberglas Corp., Pittsburgh Corning Corporation, Eagle-Picher Industries, Inc., Asbestos Corp. of America, Eastern Refraction Company, Inc., Westinghouse Electric Corp., The Southern Asbestos Co., H. K. Porter Company, Inc., Alpha Assoc., Inc., Shook and Fletcher Insulation Company, Sepco Corporation, Uniroyal, Inc., and Cummings Insulation Co., Defendants-Respondents. Action No. 6.

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NO. 81-1614

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STANLEY ROSENBERG and
BARBARA ROSENBERG, *et al.*,

Appellants,

v.

JOHNS-MANVILLE SALES CORPORATION, *et al.*,

Appellees.

On Appeal from the New York Court of Appeals

MOTION TO DISMISS

Jurisdiction

Appellants purport to invoke the jurisdiction of this Court, pursuant to 28 U.S.C. 1257 (2), on the ground that the validity of the New York Statute of Limitations, as applied to the appellants by the Courts of the State of New York, was drawn in question by virtue of the alleged repugnance of that application to the Constitution of the United States. The appellees, H. K. Porter

Company and Southern Asbestos Company, respectfully move this Court to dismiss the appeals on the dual grounds that these appeals are not properly brought before this Court under 28 U.S.C. 1257 (2) and that the question on which the decision of this cause depends does not present a substantial federal question.

Statement of the Case

The plaintiffs allege causes of action in negligence and strict products liability against the defendant manufacturers and suppliers of asbestos. It has been conceded that the last exposure of any of the plaintiffs or their decedents was more than three years before the institution of these actions. In fact, the last claimed exposure to asbestos of any of the plaintiffs or their decedents was at the latest sixteen years ago. Some have not been exposed for over thirty years.

The plaintiffs presently appeal from an order of the New York State Court of Appeals which dismissed their complaints as barred by the New York Statute of Limitations set forth at Section 214 C.P.L.R. It is their contention that the date of exposure rule, sanctioned by the highest Court of New York State, must be abrogated as to them and that a discovery rule should be instituted in its stead by virtue of the alleged fact that the application of Section 214 C.P.L.R. as to the litigants involved herein has deprived them of their constitutional rights.

It is respectfully suggested that the instant appeals are properly dismissed on either or both of the aforesaid grounds and especially in view of the patently unsubstantial character of the within appeals bordering on the frivolous, as more fully discussed below.

POINT I

Appellants are not entitled to appeal to the Supreme Court as of right.

The appellants contend that the construction of C.P. L.R. 214 by the Court of Appeals of the State of New York in such a manner as to bar their causes of action constitutes a deprivation of their constitutional rights of due process and trial by jury (Appellants' Jurisdictional Statement, page 12). It is thus quite clear therefore that the only contention regarding the said statute of limitations urged by the appellants herein is that their federal rights, arising under the United States Constitution, prevent the application of C.P.L.R. 214 to them. As such, and in view of the clear and express nature of such contention, it is quite clear that whatever other remedies are available to the appellants, if any, they may not appeal to this Court under 28 U.S.C. 1257 (2). *Mergenthaler Linotype Company* v. *Davis,* 251 U.S. 256 (1920). As expressly stated by this Court in that case in such regard (251 U.S. 259):

> "[t]he claim that the lease contract was made in course of interstate commerce and therefore not subject to state statutes, was insufficient to challenge the validity of the latter; at most it but asserted a 'title, right, privilege or immunity' under the Federal Constitution which might afford basis for certiorari but constitutes no ground for writ of error from this court."

See, also, *Charleston Federal Savings and Loan Association* v. *Alderson,* 324 U.S. 182 (1945).

Identical considerations are applicable in this case and the instant appeals are therefore properly dismissed by virtue of the foregoing.

POINT II

Jurisdiction should properly be declined for want of a substantial federal question.

It is not open to question that technical compliance with 28 U.S.C. 1257 (2) will not, in and of itself, justify the prosecution of these appeals. Thus, appellants may not appeal from the decision and judgment of the Court of Appeals of the State of New York to this Court under the aforesaid section unless there is presented a "substantial federal question". *Equitable Life Assurance Society* v. *Brown,* 187 U.S. 308, 311 (1902).

No such substantial federal question has been presented on the instant appeals and, in fact, the said appeals border on the frivolous.

The test for determining whether a "substantial federal question" is presented for purposes of 28 U.S.C. 1257 (2) is not whether there is a "mere allegation of a Federal question", *Equitable Life Assurance Society* v. *Brown, supra,* at 311, nor that the question presented is of an interesting intellectual character, *Rice* v. *Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70, 73-74 (1955).

As stated by Mr. Justice Frankfurter with respect to Supreme Court Rule 19, relating to writ of certiorari, in the latter case (349 U.S. 73-74):

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This

> is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion."

The application of Section 214 C.P.L.R. to the plaintiffs in this case in a manner which barred their causes of action can in no way be seen as presenting a "substantial federal question".

It is not open to question that the Constitution does not forbid the creation of new rights, nor indeed the abolition of old ones recognized by the common law to obtain a permissible legislative objective. *Silver* v. *Silver,* 280 U.S. 117 (1929).

The appellants contend that they have been denied access to the courts in violation of their "due process rights". However, the assertion of the appellants to the contrary notwithstanding, the right to sue for money damages is not a fundamental right guaranteed, implicitly or explicitly, by the United States Constitution. *Silver* v. *Silver, supra; Clark* v. *Gulesian,* 429 F.2d 405 (1st Cir. 1970), *cert. den.,* 400 U.S. 993 (1971). Access to the courts, not being a fundamental right, may accordingly and clearly be denied where there exists a rational basis therefor, as in the circumstances of this case. *U. S.* v. *Kras,* 409 U.S. 434 (1973); *Parham* v. *Hughes,* 441 U.S. 347 (1979).

That, in fact, the application of the New York statute of limitation, C.P.L.R. 214, to the appellants in this case does not impair fundamental rights, but is rather an expression of public policy on the "privilege to litigate," is made manifest by this Court's decision in *Chase Securities Corp.* v. *Donaldson,* 325 U.S. 304 (1945), when it stated (325 U.S. at 314):

> "Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. *Order of Railroad Telegraphers* v. *Railway Express Agency,* 321 U.S. 342, 349. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control."

More recently, and with special pertinence with regard to statute of limitations, this Court stated, in the case of *United States* v. *Kubrick,* 444 U.S. 111, 125 (1979), as follows:

> "It goes without saying that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or are applicable. We should give them effect in accordance with what we can ascertain the

> legislative intent to have been. We doubt that here we have misconceived the intent of Congress when §2401 (b) was first adopted or when it was amended to extend the limitations period to two years. But if we have, or even if we have not but Congress desires a different result, it may exercise its prerogative to amend the statute so as to effect its legislative will."

The reliance by the appellants upon the case of *Urie* v. *Thompson,* 337 U.S. 163 (1949) is misplaced (Appellants' Jurisdictional Statement, pgs. 9-11). In that case, this Court was sitting as a federal court and sought to ascertain the Congressional intent embodied in the Federal Employers' Liability and Boiler Inspection Act. See *Urie* v. *Thompson, supra,* 337 U.S. 168-170.

In the instant case, however, the legislative intent embodied in Section 214 C.P.L.R. has received clear and definitive interpretation by the Court of Appeals. It is respectfully suggested that such determination by the New York Court of Appeals, in applying the aforesaid Section 214 C.P.L.R. to bar the appellants' claims in these matters, and having a rational basis, as aforesaid, is hence not, reviewable by this Court.

Indeed, this Court has, on prior occasions, declined review in cases involving the identical issue presented herein.

One of the cases in which such issue was directly presented to this Court is the decision of the Court of Appeals of the State of New York in *Schwartz* v. *Heyden-Newport Chemical Corp.,* 12 N.Y.2d 212 (1963) *remittitur amended,* 12 N.Y.2d 1073 (1963) *cert. den.,* 374 U.S. 808 (1963).

The Court of Appeals of New York State, in this very matter and in rendering its decision holding that the ap-

pellants' actions were barred by Section 214 C.P.L.R., relied upon its prior decision in *Schwartz* v. *Heyden-Newport Chemical Corp., supra* (Appellants' Jurisdictional Statement, appendix C, page 2c).

See, also, the following cases involving statutes of limitations and in which this Court has previously declined review: *Jackson* v. *General Motors Corp.*, 441 S.W.2d 482 (Sup. Ct., Tenn. 1969), *cert. den.*, 396 U.S. 942 (1969); *Clark* v. *Gulesian, supra.*

Identical considerations are applicable in this case and it is respectfully submitted that this Court should similarly decline review and dismiss the within appeals on the ground that a "substantial federal question" is not presented.

CONCLUSION

Plaintiffs' appeals should be dismissed.

Respectfully submitted,

IRWIN H. HAUT
MORRIS, DUFFY, IVONE & JENSEN
Attorney for Appellees, H. K. Porter Company and Southern Asbestos Company in Actions Numbered 1, 2 and 5
233 Broadway—41st Floor
New York, New York 10279
(212) 766-1888

Motion to Dismiss or Affirm

6

81-1614

No. A-664

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In The

Supreme Court of the United States

October Term, 1981

STANLEY ROSENBERG and BARBARA ROSENBERG, et al.,

Appellants,

vs.

JOHNS-MANVILLE SALES CORPORATION, et al.,

Appellees.

On Appeal from the New York Court of Appeals

MOTION TO DISMISS

MILLER, MONTGOMERY, SOGI
& BRADY, P.C. Francis Y. Sogi
Attorneys for Appellee
UNARCO Industries, Inc.
200 Park Avenue
New York, New York 10166
(212) 687-1700

6654

LUTZ APPELLATE PRINTERS, INC.
NY (212) 840-9494 • (516) 222-1606 • (914) 683-9363
NJ (201) 257-6850 • PA (215) 563-5587 • DC (202) 783-7288 • MA (617) 542-1114

QUESTION PRESENTED

Is the New York Court of Appeal's determination that the New York statute of limitations [CPLR §214(5)] runs from the time of exposure to asbestos and not from discovery of alleged asbestos-related injury so repugnant to the United States Constitution that it justifies this Court's review.

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Fourteenth Amendment 1, 3

No. A-664

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STANLEY ROSENBERG and BARBARA ROSENBERG, et al.,

Appellants,

vs.

JOHNS-MANVILLE SALES CORPORATION, et al.,

Appellees.

On Appeal from the New York Court of Appeals

MOTION TO DISMISS

JURISDICTION

Appellants base this appeal on 28 U.S.C. §1257(2) under a claim that the decision of the New York Court of Appeals upholding the validity of the New York statute of limitations is violative of their due process rights under the Fifth and Fourteenth Amendments of the United States Constitution. To establish this Court's jurisdiction to review, appellants must show that the New York statute of limitations is repugnant to the United States Constitution. 28 U.S.C. §1257(2).

Review must properly be declined here as the judgment of the New York Court of Appeals rests on an adequate non-federal basis and is grounded in a legitimate state interest.

STATEMENT OF THE CASE

The plaintiffs appeal from a judgment of the New York Court of Appeals dismissing their product liability claims as barred by the New York three year statute of limitations [CPLR §214(5)]. Their claims asserted injuries caused by the inhalation of asbestos particles. However, the last exposure of any of the plaintiffs or their decedents to asbestos was considerably more than three years before commencement of their cases. The New York Court of Appeals held that the three year statutory period of limitations began to run when the plaintiffs or their decedents inhaled the foreign substance. The plaintiffs maintain that due process dictates that the limitation period applicable to their cases should run from the date on which the alleged asbestos related disease was or could have been discovered.

POINT I

Review by this Court of this appeal must be declined as the judgment of the New York Court of Appeals rests on an adequate non-federal basis and is grounded in a legitimate state interest.

Control over the procedural rules applied in a state court remains with the state and a substantial presumption arises in favor of, rather than against, the lawfulness of those procedures in the face of a challenge under federal constitutional guarantees of due process of law.

> Local processes of law are an essential part of any government conducted by the people . . . . The principle of 'Home Rule' was an axiom among

> the authors of the Constitution. After all, the vital test of self-government is not so much its satisfactoriness weighed in the scales of outsiders as it is its satisfactoriness weighed in the scales of 'the governed.' (Citation omitted).

Bute v. People of the State of Illinois, 333 U.S. 640, 652 (1947).

The present case is illustrative of a judgment by a state court which should not be invalidated as lacking in due process of law under the Fifth and Fourteenth Amendments of the Constitution of the United States. The power of the states to regulate the procedure of their own courts should be maintained.

This is not to argue that a state court in regulating its procedure may ignore due process rights. Nor did the court below do so in reaching its decision. What the New York Court of Appeals did was to invoke a concomitant principle which respects the traditional balance of responsibility between the court and the legislature.

Thus in the face of the same due process arguments as those presented by the plaintiffs in their appeal to this Court, the New York Court of Appeals held ". . . it to be inappropriate and injudicious to intrude into an area best suited for legislative scrutiny." *Steinhardt v. Johns-Manville Corporation,* No. 434 (N.Y. Ct. App., filed Oct. 29, 1981). This result is a consistent application of the New York Court of Appeals' earlier decision in *Thornton v. Roosevelt Hospital,* 47 N.Y. 2d 780, 417 N.Y.S. 2d 920 (1979).

In *Thornton,* a plaintiff brought a products liability action based on allegations that a thorium dioxide substance manufactured by the defendant and injected into the decedent twenty years prior to commencement of the action resulted in

the onset of the decedent's cancer. The New York Court of Appeals held that the cause of action accrued at the time of the invasion of decedent's body and not at the time the decedent's cancerous condition became apparent. The court specifically declined extending a "discovery" rule to the action. "Such matter is best reserved for the Legislature, and not the courts." (citations omitted). *Id.* at 782, 417 N.Y.S. 2d at 922.

With respect to a remedy for victims of asbestos-related occupational diseases, the New York State Legislature has acted and is acting. Eight separate bills have been introduced in the Legislature over the past two years.[1] Each of these bills would provide a remedy to victims of asbestos-related diseases in the form of amendments to the New York statute of limitations [CPLR §214(5)].

While to date no legislation has been enacted, the New York Legislature is currently actively involved in the necessary processes of fact-finding, weighing, evaluating and drafting. The New York State Assembly Codes Committee held hearings relating to limitations periods and occupational disease in New York City as recently as February 24, 1982 and in Albany, New York on March 3, 1982.

These hearings are the traditional application of the power to investigate, enjoyed by both the national and state legislatures, and implied in the power to legislate recognized by this Court in *McGrain v. Daugherty*, 273 U.S. 135, 161, 165 (1927). In the

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1. Assembly No. 330-A (Jan. 7, 1981)/Senate No. 3491-A (Feb. 25, 1981); Assembly No. 2572 (Jan. 28, 1981); Assembly No. 7161-A (March 31, 1981); Assembly No. 9383 (Jan. 6, 1982); Assembly No. 7710-A (March 31, 1981)/Senate No. 3795-A (March 3, 1981); Assembly No. 7733 (March 31, 1981)/Senate No. 6051 (May 5, 1981); Assembly No. 9839 (Feb. 9, 1982); Assembly No. 11124 (March, 1982).

case at bar, the court below recognized that, by its nature and vested powers, a court lacks the requisite facilities to examine the myriad consequences of the phenomena of occupational diseases as they relate to the State of New York, its populace, its health care system and its courts. The New York Legislature should be left free to develop a comprehensive remedy, including a statute of limitations, for victims of occupational disease.

Moreover, the subject matter of the legislative investigation now in progress is clearly a matter for the State of New York. Statutes of limitation

> have come into the law not through judicial process but through legislation. (Citation omitted). They represent a public policy about the privilege to litigate.

Chase Securities Corporation v. Donaldson, 325 U.S. 304, 314 (1944).

New York has a legitimate state interest in providing a remedy in its courts for victims of occupational diseases. *Henry v. State of Mississippi,* 379 U.S. 443 (1965). Similarly, it has a legitimate state interest in determining the appropriate statute of limitations for claims arising therefrom. As the New York Legislature is currently methodically evaluating proposals for a "discovery" type statute of limitations with respect to occupational diseases, it is respectfully submitted that it would be improvident for this Court to impose its own judgment.

CONCLUSION

The New York Court of Appeals has left the matter to the New York State Legislature. The Legislature is acting. Plaintiffs' appeal should be dismissed.

Respectfully submitted,

MILLER, MONTGOMERY,
SOGI & BRADY, P.C.
Attorneys for Appellee
UNARCO Industries, Inc.

Of Counsel:
Francis Y. Sogi
William L. Schierberl
Courtlandt G. Miller